United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original with aff. of mailing

74-2301

To be argued by
HOWARD J. STECHEL

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2301

TOBY ZAMBRANO,

Appellant,

—*against*—

SOL MARKS, District Director of Immigration and Naturalization Service, New York, New York,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
HOWARD J. STECHEL,
Assistant United States Attorneys,
of Counsel.

2

TABLE OF CONTENTS

Table of Cases

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2301

TOBY ZAMBRANO,

Appellant,

—against—

SOL MARKS, District Director of Immigration and Naturalization Service, New York, New York,

Appellee.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant, Toby Zambrano, appeals from a judgment of the United States District Court for the Eastern District of New York (Bruchhausen, *J.*), entered August 5, 1974, dismissing, for failure to state a claim, his complaint seeking to declare unconstitutional Section 203(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1153(a), as applied by appellee in denying appellant's petition to qualify his brother, Maximo Zambrano-Segundo, a native of Ecuador, as a preference immigrant; denying appellant's subsequent motion, predicated upon 28 U.S.C. §§ 2282 and 2284, to impanel a three-judge court to determine this action; and upholding the constitutionality of Section 203(a).

On this appeal, appellant contends that (1) the complaint presented a substantial question requiring the convening of a three-judge court to decide the constitutionality of Section 203(a); (2) the District Court acted *ultra vires*

in concluding that Section 203(a) is constitutional since such a conclusion, it is claimed, can only be reached by a three-judge court; (3) Section 203(a) is violative of the Equal Protection clause of the Fourteenth Amendment to the Constitution because, it is claimed, the section "invidiously discriminates against American citizens born in the Western Hemisphere" and in favor those born in the Eastern Hemisphere who seek to qualify an "immediate relative" as a preference immigrant; and (4) in connection with the foregoing claims, it is further asserted that a three-judge court, had it been impaneled, could have properly set a limit on the power of Congress to enact legislation creating such alleged "invidious discrimination" between American citizens.

Statement of the Case

Toby Zambrano, born in the Republic of Ecuador and subsequently naturalized as an American citizen, petitioned the Immigration and Naturalization Service in New York to qualify his brother, Maximo Zambrano-Segundo, also a native of Ecuador, as an immediate relative preference immigrant. This petition was denied by the Service on May 18, 1973. The decision of the appellee District Director was as follows:

> "The beneficiary [Maximo Zambrano-Segundo] was born in an independent country of the Western Hemisphere and is chargeable, for immigrant visa issuing purposes, only to the limitation of 120,000 on the number of immigrant visas which may be issued annually to aliens born in such countries. *Such aliens are not eligible for any preference classification under Section 203(a) of the Immigration and Nationality Act, as amended.*
>
> "The petitioner [Toby Zambrano] has the right to appeal this decision. However, in view of the *beneficiary's clear ineligibility for preference classifica-*

tion under the law, it is strongly suggested that no purpose would be served by filing such an appeal and payment of the required fee therefor.

"While not eligible for a preference immigrant visa, and while a considerable waiting period may be entailed before the beneficiary may be issued another type of immigrant visa, it is suggested that inquiry be made at a United States consular office, by or on behalf of the beneficiary, regarding the procedure for applying for such other immigrant visa." (Emphasis and bracketed words added.)

Petitioner appealed the District Director's decision to the Board of Immigration Appeals. The opinion of the Board, dismissing the appeal, was as follows:

In re: MAXIMINO *ZAMBRANO*-SEGUNDO,
Beneficiary of Visa

Petition filed by Toby Zambrano, Petitioner

IN VISA PETITION PROCEEDINGS
APPEAL

ON BEHALF OF PETITIONER:

Antonio C. Martínez, Esquire
324 West 14th Street
New York, New York 10014

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

The United States citizen petitioner sought preference status for the beneficiary as his brother under section 203(a) of the Immigration and Nationality Act. The District Director denied the petition in a decision dated May 18, 1973. The petitioner appeals from that denial. The appeal will be dismissed.

The beneficiary was born in Ecuador, an independent country of the Western Hemisphere. The District Director was correct in holding that the preference classifications established under section 203(a) of the Immigration and Nationality Act are not available to a native of the Western Hemisphere, *Matter of Donoso,* Interim Decision 2198 (BIA 1973).

Petitioner's notice of appeal contains the contention that the District Director's decision was unconstitutional because it was "based upon an invidious discrimination" against the United States citizen petitioner, solely because of the petitioner's national origin. In *Matter of Santana,* 13 Dec. 362 (BIA 1969) we rejected a similar argument. We also reiterated the position that we lack power to pass upon the validity of the statutes we administer.

We note that the petitioner claims discrimination against himself by virtue of his birth in Ecuador. This contention is without merit. Inasmuch as he is a naturalized United States citizen, the country of birth of the petitioner is irrelevant because all United States citizens stand on equal footing under the immigration laws.

We hold, then, that the District Director's denial of the petition was correct.

ORDER: The appeal is dismissed.

Acting Chairman

On December 4, 1973, appellant commenced the instant action in the Eastern District of New York. The complaint (reproduced in the Appendix to Appellant's Brief, at pages 1-a through 5-a), annexes as Exhibits the foregoing decisions of the District Director and Board of Immigration Appeals and alleges that if "plaintiff [Toby Zambrano] had been born in the Eastern Hemisphere

Country, such petition would have been approved". It is further alleged that "[p]laintiff has been invidiously discriminated against, solely on the basis of his national origin, by [reason of] defendant's application of Section 203(a)". Claiming resulting violations of the Equal Protection and Due Process clauses of the Fourteenth and Fifth Amendments respectively, the complaint demands judgment "declaring" Section 203(a) "unconstitutional and void" and "commanding defendant . . . to process plaintiff's petition to qualify his brother . . . as a preference immigrant without regard to the provisions of the said Section 203(a)."

On April 4, 1973, appellee moved to dismiss, pursuant to Rule 12, Federal Rules of Civil Procedure, upon the grounds that the complaint failed to state a claim upon which relief could properly be granted. Thereafter, on May 13, 1974, plaintiff moved to convene a three-judge court, pursuant to 28 U.S.C. §§ 2282 and 2284, to hear and determine this action.

After briefs were submitted by the parties and oral arguments heard thereon, the District Court, in an opinion dated July 31, 1974, holding that "plaintiff had not presented a substantial question for the convening of the three-judge court" and that the challenged section is "valid and constitutional", granted appellee's motion dismissing the complaint. Judge Bruchhausen's opinion and order is reproduced in the Appendix to Appellant's Brief at pages 8-a through 11-a.

This appeal followed.

ARGUMENT

The District Court properly held that this case did not require the convening of a three-judge court and that Section 203(a) of the Immigration and Nationality Act, as applied in this case, is valid and constitutional.

Appellant claims that he himself has been denied, derivatively, the equal protection of the laws because the Immigration and Nationality Act favors the admission of alien "immediate relatives" of the Eastern Hemisphere over those of the Western Hemisphere, such as his brother for whom he unsuccessfully sought preference immigrant status. He necessarily also claims that, in any event, the claim he asserted in the District Court required the impaneling of a three-judge court to hear and determine its merit. In connection with this latter contention, appellant additionally contends, that only a three-judge court could properly have upheld Section 203(a) as valid and constitutional and that the District Court acted *ultra vires* in so doing.

In the Government's view, however, the District Court properly denied appellant's motion for a three-judge court and dismissed the complaint because prior decisions of the Supreme Court and this Court foreclose appellant's claim that Section 203(a) of the Act was unconstitutionally applied to his petition to obtain preference immigrant status for his brother and, further, because appellant's claim that he himself was the subject of unconstitutional invidious discrimination is incorrect in fact and law.

(1)

Section 203(a)* of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1153(a) details the method of allocating visas to a certain category of alien visa applicants; that is, those aliens subject to the numerical limitations specified in Section 201(a) of the Act, 8 U.S.C. § 1151(a). Section 201(a)** states that the numerical limitations apply to all aliens except immediate relatives, but not including brothers, of United States citizens, as specified in Section 201(b),*** and those aliens

---

* Section 203(a) provides in pertinent part:

Sec. 203(a). Aliens who are subject to the numerical limitations specified in Section 201(a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

* * * * *

(5) Visas shall next be made available, in a number not to exceed 24 per centum of the number specified in Section 201(a)(ii), plus any visas not required for the classes specified in paragraphs (1) through (4), to qualified immigrants who are the brothers or sisters of citizens of the United States.

** Section 201(a) provides:

Sec. 201(a). Exclusive of special immigrants in Section 101(a)(27), and of the immediate relatives of United States citizens specified in subsection (b) of this section, the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, or who may, pursuant to Section 203(a)(7) enter conditionally, (i) shall not in any of the first three-quarters of any fiscal year exceed a total of 45,000 and (ii) shall not in any fiscal year exceed a total of 170,000.

*** Section 201(b) provides:

(b) The "immediate relatives" referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: Provided, that in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitation in this Chapter.

classified as special immigrants. Section 101(a)(27),* defines a "special immigrant" as an immigrant "born in any independent foreign country of the Western Hemisphere or in the Canal Zone."

The effect of the foregoing provisions is to limit the application of Section 203(a) to immigrants from the Eastern Hemisphere. Thus, aliens from Western Hemisphere countries are not eligible for any "preference" status or allocation conferred by subsection (5) of Section 203(a), 8 U.S.C § 1153(a)(5), which expressly allows the entry of alien brothers or sisters of citizens.

(2)

The United States Supreme Court has, from early times and without exception, held that "plenary power to make rules for the admission of aliens" is vested in Congress and that the exercise of this Congressional power will not be disturbed by the judicial branch of government without regard to the Court's opinion as to the fairness, wisdom or correctness of such rules. See *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 592, 596-597 (1952); *The Chinese Exclusion Case*, 130 U.S. 581 (1889). As Mr. Justice Frankfurter stated for the Court in *Galvan* v. *Press*, 347 U.S. 522, 531 (1954):

---

* Section 101(a)(2) provides:

(27) The term "special immigrant" means

"(A) an immigrant who was born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying or following to join him: Provided, that no immigrant visa shall be issued pursuant to this clause until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of Section 212(a)(14).

> "Policies pertaining to the entry of aliens . . . are peculiarly concerned with the political conduct of government . . . that the formulation of these policies is entrusted *exclusively* to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." (Emphasis added)

In *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 596-597 Mr. Justice Frankfurter, for the Court, specified the nature of the functions over which this Congressional power is plenary:

> "The conditions for the entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and *wholly outside the power of this Court to control.*" (Emphasis added.)

In *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547 (1895) the first Mr. Justice Harlan stated for the Court:

> "The power of congress to exclude aliens altogether from the United States, or to prescribe the terms upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

Most recently, in *Kleindienst* v. *Mandel*, *supra*, 408 U.S. at 755-766, Mr. Justice Blackmun, for the Court, quoted the foregoing language of Mr. Justice Harlan, referred to the plenary Congressional power over the admission of

aliens as a "power to be exercised exclusively by the political branches of government," and further stated:

> ". . . the Court's reaffirmations of this principle have been legion. [Footnote citing cases omitted]. The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden'. . . . 'Over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."

(3)

In the face of this deeply embedded principle of judicial non-intervention in the regulation of the "admission of aliens", appellant contends that the denial of a visa preference for his alien-brother, pursuant to the preference classification enacted by Congress in Section 203(a) and the related sections of the Immigration and Nationality Act of 1952, amounts to an unconstitutional discrimination between himself and other American citizens, violative of the equal protection clause of the Fourteenth Amendment, because, "since one's brothers and sisters are generally natives of the same country as one's [own] country of origin", "the discrimination becomes one invidiously based on one's [own] national origin." (App. Brief, p. 6).

With respect to this central contention of appellant, the Government first respectfully notes that, as a matter of incontrovertible fact, appellant's alien brother was *not* denied preference immigrant status because of appellant's place of birth but because of his own place of birth. Accordingly, insofar as appellant's claim of denial of equal protection is based on the express contention that his own place of birth is the basis of an unconstitutional classification, such claim is simply incorrect as a matter of fact.

If the constitutional claim be interpreted as a contention that the *effect* of the Act is to discriminate unconstitutionally between naturalized American citizens seeking to bring their brothers here as preference immigrants, the Government submits that this contention, too, is without merit and is foreclosed by long-standing as well as very recent Supreme Court precedent.

With respect to this claim, it is first noted that appellant cites no authority indicating that there is any constitutional right to have one's relatives granted preferential (or any) treatment as visa applicants. Rather, the Supreme Court has long and without exception held that the right and terms upon which any and all aliens may enter this country is within the sole power of Congress to determine and will not be disturbed by the judicial branch of government. Given this premise, which, we submit, appellant fails to undermine by reference to any authority, the effect of the exercise of this unquestionable power by the Congress becomes irrelevant so long as ordinary procedural due process is observed in administering the legislative intent of Congress. Were that premise undone, the plenary Congressional power with respect to the entry of aliens would be sharply curtailed and at least a century of Supreme Court immigration decisions would in effect, have to be overturned. We cannot perceive how appellant "can thread a way through the thicket" of prior Supreme Court decisions in this area "so long as these decisions stand" *United States* v. *Jenkins*, 490 F.2d 868, 880 (2d Cir. 1973) (Friendly, *J.*; in a different legal context). And appellant cites no case (and none exists to our knowledge) even suggesting that ordinary equal protection standards are to be applied in this area or that there is any constitutional right on the part of American citizens to have a relative granted entry or treated in any prescribed manner. Rather, the Supreme Court's most recent decision in this area rejected an argument closely similar to that of appellant, viz. that

there is a "derivative" constitutional right on the part of American citizens to any alien being granted entry.

In *Kleindienst* v. *Mandel, supra,* 408 U.S. at 754, the Court stated that the appellees therein framed the issue as follows:

> "Does appellants' [the government's] action in refusing to allow an alien scholar to enter the country to attend academic meetings violate the First Amendment rights of American scholars and students who had invited him."

The Supreme Court made the following relevant observations with respect to this asserted right:

> "It is clear that Mandel [the alien scholar] personally . . . had no constitutional right of entry to this country . . . The appellees concede this . . . The case, therefore, comes down to the narrow issue whether the First Amendment confers upon the appellee professors because they wish to hear, speak, and debate with Mandel in person, the ability . . . to compel the Attorney General to allow Mandel's admission. (408 U.S. at 762, 92 S. Ct. at 2581)
>
> "[This] Court without exception has sustained Congress 'plenary power to make rules for the admission of aliens' . . . We are not inclined in the present context to reconsider this line of cases . . . Indeed, the appellees . . . do not ask us to do so. The appellees recognize the force of these many precedents . . .
>
> "Appellees' First Amendment argument would prove too much. In almost every instance of an [excluded] alien . . . there are probably those who would wish to meet and speak with him . . . Were we to endorse the proposition that governmental power

> to [exclude the alien] . . . must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien . . . one of two unsatisfactory results would necessarily ensue. Either every claim would prevail in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest . . . according to some yet undetermined standard . . . " (408 U.S. at 767-770, 92 S. Ct. 2584-2585)

This reasoning is also clearly applicable here. If the mere fact that an alien is the brother of a United States citizen required that the alien either be admitted, or treated in some proportionally representative manner reflective of the number of alien applicants having brother-citizens in this country, such requirement would render Congressional plenary authority over quotas and rules for the admission of aliens "a nullity". In short, we do not believe that the Supreme Court's decision in *Kleindienst* v. *Mandel, supra*, would have been any different had the appellee's therein grounded their constitutional claim on the equal protection clause as opposed to the first amendment.* Given the premise of Congressional hegemony in establishing immigration policy and law, the Supreme Court has refused to make inroads despite the resulting effect the law may have on derivitively affected citizens.

That the exercise of this plenary Congressional power over the admission of aliens also results in a citizen-brother (who may have been born in a hemisphere differ-

---

* Thus, it could not reasonably be supposed that a showing of a pattern of discrimination by the State Department by which alien scholars of one political persuasion were allowed entry, while those of a different ideology were denied entry, would have altered the holding in *Kleindienst* v. *Mandel, supra.*

ent from his brother or have become the alien's brother by means of remarriage of their "parents" or even by prearrangement) being denied his asserted "right" to have his alien brother obtain preference status is clearly a coincidental and inevitable side effect of the legitimate exercise by Congress of its plenary power. To hold otherwise would logically lead to the result that our immigration quotas and preference categories would need to grant, proportionally, entry to that number of applicants for entry who have brother-citizens in this country. This would clearly nullify plenary Congressional authority for the promulgation of rules and quotas for the entry of aliens and render such rules and quotas arbitrary and irrational. The Supreme Court's recognition of Congress' plenary power in this area is in part a recognition of the changing foreign policy and national security implicatons of this governmental functon. To limit and, indeed, arbitrarily circumscribe and direct the manner of the exercise of this power by Congress, as appellant here suggests, would not only contravene and overrule over a century of definitive Supreme Court decisions, but would itself be irrational and preclude a reasoned exercise of the power by Congress including an evaluation of the political and international repercussions of the exercise of such power. It would prevent Congress from adapting the quota and preference system to changing political and international conditions insofar as brothers of American citizens are concerned since they would have to be treated the same regardless of their country of origin. Thus, as to this class of alien applicant, Congress would have no power to favor one country or region of origin over another. All alien "brothers" would have to be treated alike.*

---

* Quite clearly, Congress has avowedly intended to discriminate against aliens from the Western Hemisphere. Section 202(a) of the Act, 8 U.S.C. § 1152(a), provides:

[Footnote continued on following page]

Indeed, this Court has rejected a claim very similar to that of appellant. *Faustino* v. *Immigration and Naturalization Service,* 432 F.2d 429 (2d Cir. 1970), was an action brought on behalf of an infant citizen plaintiff born in the United States to Portuguese parents. The Service denied her application to classify her father as an immediate relative pursuant to § 201(b) of the Act, as amended, 8 U.S.C. § 1151(b) and thereby relieve him of the numerical limitations imposed by that Section on immigrants *other* than those from the Western Hemisphere on the ground that the plaintiff was not yet 21 years of age. Plaintiff challenged the constitutionality of the Section as applied to her and unsuccessfully moved for the convening of a three-judge court. On appeal, as a part of a new assertion of unconstitutionality, plaintiff pointed to § 212(a)(14) of the of the Act, 8 U.S.C. § 1182(a)(14), which requires "aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor" to obtain a certificate from the Secretary of Labor before they can be granted a visa. Among those exempted from this requirement are immigrants who were "born in any independent foreign country of the Western Hemisphere" so long as they have a child, of whatever age, who is a United States

---

> "No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in sections 1101(a)(27), 1151(b), and 1153 of this title."

Thus, for a court to declare such discrimination unconstitutional, it would be required to adopt the position of the three judge court in *Kleindienst* v. *Mandel, supra, sub nom, Mandel* v. *Mitchell,* 325 F. Supp. 620, 626 (1971) wherein the main rationale of the court, found lacking by the Supreme Court, was that "[t]he sole and selective effect of the statute is to operate as a means of restraining the entry of disfavored political doctrine. . . ." Plainly, appellant's "right" to the company of his brother is no greater than the first amendment rights of the plaintiffs in the *Mandel* case.

citizen. In addressing the distinction drawn in Sections 201(b) and 212(a)(14) between immigrants born in the Western Hemisphere and those who are not, this Court stated:

> "Precisely how § 212(a)(14) is thought to advance plaintiff's equal protection claim is not entirely clear. The distinction drawn there between those immigrants who are from the Western Hemisphere and those who are not is also incorporated into § 201's quota limitations. *Whether the favor for Western Hemisphere immigrants rests on considerations of good-neighborliness or on ideas, perhaps outmoded, that citizens of Western Hemisphere republics are better attuned to this country's way of life, the decision was within Congressional competence.* If plaintiff hopes to demonstrate arbitrariness of the 'adult-minor' distinction in § 201(b) by contrasting it with the absence of such a distinction in § 212(a)(14), her argument is equally unpersuasive. Congress could reasonably deem the considerations relevant to the labor certification requirement for eligible Western Hemisphere immigrants to be quite different from those determining whether immigrants from other parts of the world should be allowed to enter without numerical limitation. The dangers of immigration law evasion, for example, might have been found to be of wholly different dimensions in the two cases. Dealing differently with different problems does not offend the requirements of equal protection or due process. *Cf. Tigner v. Texas,* 310 U.S. 141, 147, 60 S. Ct. 879, 882, 84 L. Ed. 1124 (1940) (Frankfurter, *J.*) ('The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.')." (Emphasis added.)

(4)

Even if, contrary to established law, ordinary equal protection standards were to be applied and a "derivative" constitutional right of appellant recognized, the Government submits that his claim would still not succeed for failure to show that Congress' judgment, in establishing the present countries of origin which are granted preferential status, bears *no* "reasonable basis" or "rational relationship" to the foreign relations or domestic affairs goals Congress perceived to be advanced by such quotas. Conversely, as noted above, adopting appellant's argument would supplant congressional policy and necessarily make the immigration quotas inflexibly relative of our *present* domestic population of citizens having brothers or other relatives seeking entry. All those citizens having "brothers" would have to be treated alike. That is, all such alien brothers would have to be admitted (or denied admission) without regard to their country or hemisphere of origin. Congress' power to favor one country of origin or region in granting visas to such persons would thus be terminated. This immigration scheme would thus, in part, also create an immutable formula which would, as noted, preclude Congressional evaluation of the changing conditions in the international community and prevent the legislators from weighing whether a "reasonable basis" or "rational relationship" in fact exists between the quotas for given countries or regions and existing and changing goals of our foreign and domestic policy as reflected in the immigration laws. The difficulty inherent in adjudicating such a claim is perhaps one reason why the Supreme Court has, without exception, recognized congressional and executive power in this area as plenary.

Moreover, adopting appellant's argument would also create a claim of constitutional deprivation on the part of relatives or friends of alien applicants not within the terms of appellant's argument. Half-brothers, cousins, friends,

sponsors, and religious or national compatriots of those not also given preference or "equal treatment" might assert that to limit "equal treatment" to blood brothers is violative of equal protection. The Court might find itself weighing the "quality", "genuineness", "sincerity" of the given relationship asserted. The mere fact of a blood tie, independent of the underlying hemispheric preference, proves little and does not necessarily advance any goals Congress chooses to implement. Ability to provide a job or home for an immigrant might be more relevant. Thus, for those kinds of reasons, the Supreme Court refused to enter a similar realm of inquiry in *Kleindienst* v. *Mandel, supra.* In sum, on its own terms, appellant's equal protection argument that a blood tie to the alien applicant itself shows that he should be entitled to given preferential treatment would also be illogical.

(5)

For all of the above reasons, the United States respectfully submits that the District Court, "not unmindful of its responsibility to carefully scrutinize a request to convene a three-judge court, in the interests of judicial economy. *Bynum* v. *Connecticut Commission on Forfeited Rights*, 410 F.2d 173 (2d Cir. 1969)" (App. Appendix, p. 9a), correctly concluded that the appellant did not present "a substantial question for the convening of a three-judge court". (*Ibid.*)

As this Court pointedly noted in *Bynum,* there may "indeed be instances when we would 'accomplish little save *elegantia juris*' by reversing and convening a three-judge court which would ultimately dismiss the complaint." (410 F.2d at 176).

CONCLUSION

The judgment of dismissal should be affirmed.

Respectfully submitted,

Dated: December 27, 1974

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
HOWARD J. STECHEL,
Assistant United States Attorneys,
of Counsel.